

Clarifications to the COVID-19 commercial leasing regulations

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On 3 July 2020, New South Wales amended the *Retail and Other Commercial Leases (COVID-19) Regulation 2020* and Schedule 5 of the *Conveyancing (General) Regulation 2018* (together, **Regulations**) to clarify the coverage of the protections offered by the Regulations. The Regulations, introduced on 24 April 2020, give effect to the *National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles During COVID-19 (Code)* which was adopted by the Federal Government on 7 April 2020. You can read more about the Code in our previous paper which can be found [here](#).

Summary of the Regulations

The Regulations prohibit a lessor of an *'impacted lease'* from taking any *'prescribed action'* against the *'impacted lessee'* on the grounds of a breach of the lease during the *'prescribed period'* consisting of:

- (a) a failure to pay rent;
- (b) a failure to pay outgoings; or
- (c) the business not being open during the hours specified in the lease.

The Regulations require a lessor, if requested by its lessee, to renegotiate the terms of the lease, including the rent payable under the lease. A renegotiation must have regard to:

- (a) the economic impacts of the COVID-19 pandemic; and
- (b) the leasing principles set out in the Code.

Notwithstanding the aforementioned prohibition, the Regulations allow a lessor to take *'prescribed actions'* on the grounds of the lessee's failure to pay rent if the lessor has renegotiated the terms of the lease with the lessee.

For the purposes of the Regulations:

- (a) an *'impacted lease'* is any retail or commercial lease to which an *'impacted lessee'* is a party;
- (b) a lessee is an *'impacted lessee'* if the lessee:
 - (i) qualifies for JobKeeper; and
 - (ii) had a turnover in the 2018-2019 financial year of less than \$50 million.

Note: a lessee does not need to receive or even be enrolled for JobKeeper. A lessee just needs to qualify for JobKeeper.

- (c) *'prescribed action'* means action taken by the lessor seeking a remedy for the lessee's breach of the lease; and
- (d) *'prescribed period'* is the period from 24 April 2020 to 24 October 2020.

Amendment to the Regulations

The amendment to the Regulations clarified the following:

- (a) the requirement for a lessor to renegotiate its lease only apply to lessors of *'impacted leases'*; and
- (b) the prohibition on a lessor taking *'prescribed action'* without having first renegotiated its lease only apply to lessors of *'impacted leases'*.

Prior to the amendment, there was a possible interpretation that the Regulations enabled *any* lessee to require its lessor to renegotiate its lease and prohibited every lessor from taking *'prescribed action'* unless the lease has been renegotiated.

The amendment also introduced a new requirement on *'impacted lessees'*, which is to give to the lessor:

- (a) a statement to the effect that the lessee is an *'impacted lessee'*; and
- (b) evidence that the lessee is an *'impacted lessee'*.

If an *'impacted lessee'* fails to give the above items to the lessor, the lessor is allowed to take *'prescribed actions'* on the grounds of the lessee's failure to pay rent without having first renegotiated the terms of the lease.

Continuing uncertainties with the Regulations

The 3 July 2020 amendment offers some clarity and smooths out some of the kinks of the Regulations, but there are and continue to be ambiguities with the Regulations which make its application challenging to lessees and lessors alike.

Some questions which remain unanswered include:

- (a) what counts as evidence that the lessee is an *'impacted lessee'*;
- (b) how does a lessor satisfy the requirements to renegotiate a lease if the lessee is not cooperative or responsive;
- (c) can a lessor take *'prescribed action'* if the parties fail to reach an agreement when renegotiating the lease; and
- (d) will the Regulations be replaced or extended beyond 24 October 2020.

As we have passed the half way point of the Regulations' 6 month effective period, it does not look like the other uncertainties will be dealt with before the Regulations are repealed on 24 October 2020. We will continue to monitor any changes to the Regulations and to this space and provide further updates in due course. In the meantime, we encourage lessors and lessees to contact us for assistance.

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